



U.S. Department of Labor

**Office of Administrative Law Judges
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Date: February 22, 2000

Case No: 1999-LHC-1811

OWCP No: 06-159650

In the Matter of:

GARY L. PLEDGER,
Claimant,

vs.

BENDER SHIPBUILDING & REPAIR CO.,
Employer.

APPEARANCES:

D.B. BASS-FRAZIER, ESQ.
On behalf of the Claimant

DOUGLAS L. BROWN, ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Gary L. Pledger (Claimant) against Bender Shipbuilding & Repair Co. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was

referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing in Mobile, Alabama, on November 17, 1999. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. SYNOPSIS

Claimant was a paint foreman for Employer from 1985 until 1993. On October 21, 1992, Claimant sustained an injury to his left shoulder. The shoulder was treated with medication and by placing the left arm in a sling. Claimant returned to his duties as a paint foreman with only a few days of work missed due to the injury. On May 31, 1993, Claimant was terminated as a paint foreman but continues to work for Employer in an hourly wage position that pays less than the salaried paint foreman position. Eventually, when conservative care did not relieve Claimant's symptoms, two surgical procedures were performed on Claimant's shoulder.

Claimant asserts that because of his shoulder injury he could not perform the duties of a paint foreman and that he is entitled to compensation based on the difference between the pay of a paint foreman and his current pay from Employer. Employer counters that Claimant was terminated from his position as paint foreman for reasons unrelated to his shoulder injury and that Claimant is able to return to his regular, usual employment as a paint foreman. The issue to be decided is whether or not Claimant sustained a wage-earning loss as a result of his 1992 unscheduled left shoulder injury.

II. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 1999-LHC-1811 (JE-1):

1. Jurisdiction is not a contested issue. Claimant was working in Bender Shipbuilding & Repair Company's Yard 9 and was working adjacent to the dry dock wall when injured. Claimant was a shipyard paint foreman at the time of the on-the-job injury and employed by a shipbuilding and repair company with its facilities adjacent to navigable waters of the United States.

2. Date of injury/accident: October 21, 1992.

3. Injury occurred within the course and scope of the employment: Yes.

4. Employer/Employee relationship existed at the time of the accident: Yes.

5. Date Employer advised of the injury: October 21, 1992.

6. The Notice of Controversion (LS-207) filed on: May 26, 1994.
7. Date of Informal Conference: October 24, 1994.
8. Average weekly wage at the time of the injury: \$718.75.
9. Nature and extent of disability: Disputed.
 - a) Temporary Total Disability: 8/11/93 to 9/19/93; 5/4/94 to 9/6/94 (23 5/7 weeks at \$479.17 per week for a total of \$11,852.85)
 - b) Medical benefits paid: Yes.
 - c) Permanent Disability: 8% whole person from left shoulder.
10. The date of maximum medical improvement: May 3, 1995.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant has been continuously employed at Bender since 1981. On October 21, 1992, Claimant was injured while working as a salaried paint foreman, a position he had held for seven or eight years at the time of the accident. Claimant testified that he won several jackets and safety awards during his time as a paint foreman. Claimant was also named as the U.S.S. Pensacola Shipyard Worker of the Month in November, 1996. (Tr. 20-29).

Claimant's October 21, 1992 injury occurred while he supervised his painting crew in a dry dock. Claimant testified that he often lent a hand in moving hoses and other materials although it was not in his job description. At the time of the injury, Claimant was in the process of moving a paint line from one side of the vessel to the other. As he went under the keel of the vessel, he could see fire to his left where Mr. Sampey was welding a plug inside of the vessel while standing on a man-lift. Upon reaching the opposite side of the vessel, Claimant was struck by a freshly cut steel plate. As a result of the accident, Claimant underwent two surgeries performed by Dr. Cockrell. (Tr. 30-33).

As a paint foreman, Claimant's duties included obtaining the correct paint, getting his crew set up and supervising their progress. Claimant testified that this generally involved the movement of 100-pound paint barrels through ankle deep sand. Though he had a pot helper, he would often aid in the movement of the materials. The materials were generally moved by hand as a forklift could not be moved into the dry dock and the man-lift had trouble moving in the sand. Climbing was an everyday part of the job because Claimant was responsible for inspecting all of his crew's work. If they were painting in a tank, he might have to climb down 15 to 30 feet. If his crew was working on a vessel's underwater hull, the climbing was limited to checking the sand hopper. The hopper was examined by climbing 30 feet to its top and looking inside to gauge the level of the sand. Claimant would either perform this duty himself or have a crew member do the examination. According to his testimony, all of the other paint foremen were known to perform the visual check from time to time.

Claimant would generally check the hopper personally because he arrived before the rest of his crew and it was his duty to order more sand. (Tr. 33-36).

Claimant indicated that his overhead work was limited to inspections of the work performed by sandblasters and painters. Much of this was performed with the aid of mirrors and flashlights. The mirror was held in one hand while the flashlight was held in the other hand. Claimant tried to perform the duty one-handed after his surgery but experienced pain as a result. Claimant also indicated that a foreman had to crawl around a lot to check all the parts of a tank, including those areas which were difficult to reach. (Tr. 36-40).

Claimant's termination from the paint department was based in part on damage sustained by a pick-up truck under his control. One of the sandblasters on Claimant's crew broke a window on the truck when he accidentally sandblasted the truck. According to Claimant, trucks were occasionally damaged but no one was ever terminated as a result. (Tr. 41-44).

After Claimant's shoulder injury, he attempted to return to his standard employment although he was restricted to light duty. He was performing his usual lifting, crawling and climbing in order to get the jobs done on time. Claimant also testified about the painting company which Mike Corbitt was running out of Claimant's house. Mr. Corbitt paid the phone bill so Claimant's residential number was the same as that for the painting company. (Tr. 45-47).

Claimant's relationship with Mr. Griffeth was problematic. Mr. Griffeth had refused to work with Claimant because one of Claimant's painters did not finish a job correctly which caused the company some delay in finishing a project. Prior to the window being sandblasted, he was trying to have Claimant transferred out of the painting department. Claimant had refused the transfer to new construction because it would have paid less. Claimant stated that he enjoyed working for Employer and had demonstrated his devotion by working while his shoulder became increasingly painful. (Tr. 47-50).

On cross-examination, Claimant agreed that Dr. Cockrell had restricted him from climbing ladders over 12 feet, performing overhead work, lifting weights greater than 30 pounds and carrying more than 50 pounds. Claimant testified that as a paint foreman you could not work within those restrictions. Claimant indicated that though other crew members could perform the heavy lifting, it was not the way it was actually done. Claimant conceded that one of the responsibilities of the pot helper was to climb the ladder and check on the level of sand in the hopper. Claimant also conceded that the dry dock was entered through a door and did not require climbing a ladder or stairs to arrive at the work site. Equipment was lifted to a job location by a crane operated from the shore. According to Claimant, there was a need to perform overhead work when he was checking the work performed by the sandblasters. He would have a flashlight in one hand and a scraper in the other hand which he was trying to wedge under loose material. (Tr. 50-56).

At the time of the accident Mr. Sampey was a paint foreman. Claimant never asked Mr. Sampey for any aid in performing his job. Claimant testified that he never complained to Mr. Griffeth about his pain because he would have been fired for complaining. According to Claimant, he was

never informed as to the reason for the February 1993 change from salary to hourly pay. Claimant was informed of the change on February 15, 1993, and it took effect on February 26, 1993. Claimant was terminated as a paint foreman on May 31, 1993. (Tr. 56-60).

Claimant testified that he can perform the overhead inspections but he would need to rest more frequently because his left shoulder muscles are weaker than they used to be. He also testified that he is right-handed. During the inspection, the flashlight is in the right hand and the mirror is in the left hand. The mirror is mounted on the end of a pole or telescoping rod which weighs about one pound. In his own opinion, he is capable of performing the work, just at a slightly slower pace than he did prior to the accident. Of the painting, 70% consisted of underwater hulls with the other 30% comprised of tanks, crawl spaces and other areas. During the day, there are several paint foreman working on a given project. In theory, it is possible for the supervisor to assign crawling jobs to another foreman. According to Claimant, he could not perform a foreman's work in his current state because of the unofficial lifting which is done by the foreman. (Tr. 60-70).

Claimant testified that his son did some construction and painting work for John Seignious in 1994 and 1995. Claimant went along and observed but did no work and received no money from the project. Claimant did no physical labor on the job, nor did he climb a ladder. (Tr. 66-69).

Testimony of John Seignious

Mr. Seignious hired Claimant and his son to remove and replace some rotted wood around his home. The job entailed removing the rotted fascia board on the eaves and replacing it with new lumber. He observed Claimant removing old wood, hammering and painting new wood. Due to the location of the work, Claimant was working overhead on a six-foot ladder. According to Mr. Seignious, Claimant performed as much work as his son. Mr. Seignious was unable to remember to whom he had written the check with which he had paid for the work. (Tr. 75-80).

Testimony of David Sampey III

Mr. Sampey is a paint supervisor for Employer and has worked in the paint department since 1974. He has both supervised and worked as a paint foreman in his time with Employer. In his estimation, Claimant's restrictions would not prevent him from working as a foreman in the paint department. The foreman is not required to lift the 50 to 100 pound buckets of materials. Mr. Sampey testified that it is his personal nature to move the buckets but he is not required to perform such manual labor. Furthermore, the foreman is only responsible for having someone check the bins, not performing the work by himself. It is the pot helper's job to check the level of all items needed for the day's work. If materials are needed from the warehouse, they are loaded by forklifts and the foreman can either go himself or send a member of his crew. Company policy is for the foreman to stay at the job and send another individual. (Tr. 80-83).

After his accident, Claimant informed Mr. Sampey that his restrictions prevented him from climbing and crawling. Mr. Sampey indicated that he was able to assign Claimant jobs where that was not necessary as 95% of the work is on underwater hulls. Because he felt that Claimant could

perform his work within the restrictions, his demotion from salary to hourly wages was not based on his restrictions nor were the restrictions a factor in Claimant's termination as a paint foreman. In the 1980's, Mr. Sampey was a paint foreman with Claimant and often heard the paint supervisor threatening to fire Claimant for his inability to run a big project. As a result, Mr. Sampey would work in the same area as Claimant and lend a hand in the management of the project. He cited one instance when Claimant painted a barge with the wrong type of paint. Mr. Sampey testified that he was able to hide many of Claimant's mistakes but not all of them. These mistakes were in no way related to Claimant's injuries. (Tr. 83-86).

On the day that Claimant was injured, he had called Mr. Sampey to the job site to show him something related to the job. When Mr. Sampey arrived, he found that a man-lift was located in an area where hot work was being done. He yelled at Claimant about the sparks falling on the man-lift then moved the lift himself. As he was moving the lift, Mr. Sampey could see Claimant going under the vessel to get to the lift. According to Mr. Sampey, this was just another occasion where Claimant demonstrated poor equipment and tool management and where he had to cover his friend's mistake. It was this inadequate performance that caused Claimant's eventual termination from the paint department. The truck window was another example. Claimant was not terminated because of the window, rather he was disciplined because he had repeatedly been warned about getting overspray on the truck. The company policy is for the truck never to be in the dry dock during painting or spraying.

Mr. Sampey testified that it was not his wish to testify in this proceeding. It meant that he was having to testify against a long-time friend who is a hard worker; however, Claimant was not qualified to be a foreman. (Tr. 86-90).¹

On cross-examination Mr. Sampey testified that he worked as a foreman until either 1990 or 1991 and that Claimant was an hourly foreman until January 1, 1991, when he was made a salaried employee. During his time as a foreman, Mr. Sampey did on occasion check the sand level personally. According to Mr. Sampey, the only time a mirror is needed for the inspection process is for looking behind something. He also indicated that it was possible to tape the flashlight to the mirror's rod and thereby only use one hand. When asked about the accident, Mr. Sampey indicated that the foreman in charge of the individual cutting the plate should have marked off the area of danger. (Tr. 90-96).

On redirect Mr. Sampey testified that part of Claimant's performance problems stemmed from the amount of rework that was necessitated by his mistakes. Because of the rework, Claimant was unable to make his budget on occasion. Claimant was further cited as having caused the loss of painting equipment due to neglect. (Tr. 97-99). On re-cross Mr. Sampey testified that cash bonuses

¹ I was very impressed with Mr. Sampey. He obviously did not like testifying in a manner that was critical of Claimant. Under the circumstances, I find him to be a very credible witness.

allotted to a salaried employee were intended as a token to make up for the raises that hourly workers received. Other than that, they had no significance and only one bonus was received each year. (Tr. 99-100).

Testimony of Frank Griffeth

In October 1992, Mr. Griffeth was the manager of the paint department. In his opinion, an individual with Claimant's physical restriction would be capable of performing the duties required of a paint foreman. There is no requirement or need for the foreman to be able to perform all the duties required of the different paint crew members. (Tr. 111-113). When possible, lifting is performed by forklifts or cranes and the sand hopper should be checked by the pot helper. The work on the side of the vessel is either done from the floor of the dry dock or from the platform of a man-lift. Mr. Griffeth further testified that there is currently enough work that a foreman could be assigned to an area where no overhead work was required. An example would be the blasting yard where sections are sandblasted while sitting on small platforms and then coated. The foreman need only check that the work is performed according to specifications. (Tr. 114-117).

According to Mr. Griffeth, the salary in new construction is the same as that for a foreman in repair work. All salaried employees are given a bonus. A bonus of \$1000 is considered to be at the low end for those bonuses. It is the dollar amount and not the actual receiving of the bonus which signifies the merit associated with the award. From 1991 to 1993, the average range of bonuses in the paint department was \$1,800 to \$2,500. (Tr. 117-118). Mr. Griffeth also received a Shipmate of the Month certificate for the USS Pensacola project. It is standard practice for the Navy to send them to the foremen and supervisors on a given project as a public relations tool. (Tr. 113-114).

Mr. Griffeth was the individual responsible for switching Claimant from a salaried employee to an hourly employee. His reasons included Claimant's problems in completing jobs within budget; Claimant's inability to follow job specifications; damage sustained by equipment which he was responsible for; improperly filled out time cards and bad job numbers. Because of these problems, Mr. Griffeth switched Claimant to an hourly employee in an attempt to send him a message. The switch was intended as a probation of sorts and explained to Claimant as such in a meeting at Mr. Griffeth's office. Mr. Griffeth also was the party responsible for filling out the May 31, 1993 termination slip which ended Claimant's employment as a paint foreman. The reason for the action was tied to Claimant's handling of the broken window in the truck and not his physical post-injury restrictions. A couple of days prior to the window incident, Claimant had been admonished for having overpainted one whole side of a truck when he left it in the dry dock. As a result, a meeting was held instructing all foremen not to leave the trucks in the dry docks. After this warning, Claimant's crew was responsible for the accident in which the truck was sandblasted. In light of the other problems, Mr. Griffeth testified that the window was the straw which broke the camel's back. According to Mr. Griffeth, he had to discipline three or four other individuals in the past who continually caused damage to the trucks. (Tr. 118-124). Claimant could have been refused further employment with Employer; however, Mr. Griffeth felt that Claimant was a good employee who should simply work in some other department besides painting. By the day of the termination, Claimant had already approached the carpentry superintendent about transferring departments. (Tr.

131-133).

On cross-examination Mr. Griffith testified that during his employment as a paint foreman, he did inspect the sand hopper and performed overhead work. He also testified about two occasions where individuals were disciplined for damaging equipment. Their punishments varied from two weeks without pay to a full employment termination. In both cases the individuals were sandblasters; however, their foremen were also given verbal warnings regarding their responsibility for the equipment used by their crew members. (Tr. 124-128).

Medical Evidence

Dr. J. Michael Cockrell was Claimant's treating physician for the left shoulder injury along with subsequent injuries to Claimant's knees and back. Dr. Cockrell began with conservative treatment. On January 3, 1993, Claimant told Dr. Cockrell that he had improved significantly since his last visit and has continued to work and is doing okay there. Dr. Cockrell's February 10, 1993 chart note states: "The patient states his job does not require much in the way of heavy lifting and overhead activity. Therefore, we will release him to full duty and see how he does over the next six weeks."

Dr. Cockrell performed a CT arthrogram on May 28, 1993, and shoulder surgery on August 11, 1993, and on May 4, 1994. After Claimant reached maximum medical improvement on May 3, 1995, Dr. Cockrell assigned permanent work restrictions of no overhead work, no ladder climbing over twelve feet, no lifting over thirty pounds and no carrying over fifty pounds. (CX. 11).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 9990 F.2d 730 (3rd Cir. 1993).

NATURE AND EXTENT

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for Claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). A judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). A Claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

There is no dispute in this case that Claimant suffered a permanent physical disability as a result of his October 21, 1992 shoulder injury. The issue before this Court is the extent to which Claimant's physical disability has affected both his ability to perform his usual employment and his wage-earning capacity under the Act. Claimant has taken the position that he is unable to return to his usual employment as a paint foreman as a result of the physical restrictions stemming from his accident. Employer has countered that Claimant can perform his usual employment as a paint foreman and that the termination of Claimant's employment as a paint foreman was caused by Claimant's poor performance and not his physical restrictions.

In support of his position, Claimant testified at length regarding the physical duties, official and unofficial, which are performed by a paint foreman. According to his testimony, a paint foreman is officially required to supervise/manage the operations of his crew and to perform a post-procedure inspection of the surface being worked upon. This inspection is a two-handed operation involving either the use of a mirror and a flashlight or a flashlight and a pudgy knife. Unofficially, the paint foreman generally performs those tasks which are going to aid in the completion of the project. This might include getting 50-100 pound paint cans from the warehouse, moving equipment and climbing the ladder to check the level of the sand hopper. In Claimant's opinion, the official and unofficial tasks both violate his physical restrictions which do not permit climbing ladders over 12 feet, performing overhead work, lifting weights greater than 30 pounds or carrying more than 50 pounds.

Employer counters by offering the evidence of Mr. Griffeth and Mr. Sampey. In their opinions, an individual with Claimant's restrictions can work as a paint foreman. In describing the duties of a paint foreman, their testimony was that the foreman would be required to perform the official duties Claimant listed but not the unofficial duties. Checking the sand hopper and moving equipment are actually the responsibility of either the pot helper or the leaderman. As for obtaining materials from the warehouse, Mr. Sampey testified that the company policy was for the foreman to remain at the job site while another crew member was sent to obtain the materials. Even if the foreman did drive the truck, there were forklifts, cranes, cherrypickers and other crew members to perform the loading and unloading of the materials. Regarding the need to perform overhead work, Claimant conceded that his overhead work was limited to inspections of the work performed by sandblasters and painters. Mr. Griffeth indicated that there was sufficient work that a paint foreman could be assigned in the blasting yard which required no overhead work. Mr. Sampey indicated ninety

five percent of the work involved underwater hulls where there would be no need for the mirror to be used in checking the surfaces. Furthermore, Claimant could use a man-lift to check the surface above his head without the need to climb a ladder.

After considering the testimony provided regarding the usual duties of a paint foreman, I find that Claimant has overstated the duties which are required of a paint foreman. There has been no evidence presented that there was direct or indirect pressure exerted by his supervisors to perform any duties beyond his official paint foreman responsibilities. The fact that he occasionally and voluntarily performed those acts or that other foremen occasionally performed them does not make them usual. The evidence supplied by Employer's supervisors demonstrates that they would consider it the usual duty of other crew members but not the foreman.²

I also note that Claimant was telling his treating physician that he was doing okay at work. Concerning his work activities, Dr. Cockrell's February 10, 1993 chart note states: "The patient states his job does not require much in the way of heavy lifting and overhead activity." Based on Claimant's description of his paint foreman job, Dr. Cockrell released Claimant to full duty.

I find that Claimant was and is capable of performing the duties of a paint foreman. I further find that his terminations as a salaried employee and as a paint foreman were for causes unrelated to the injuries suffered on October 21, 1992.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

Claimant's claim for compensation under the Act is hereby **Denied**.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge

² Claimant's attorney invited this Court to take judicial notice of the DOT occupational descriptions provided on the Department of Labor's web site. I find that the appropriate job description is that of Painting Supervisor (840.131-014) which conforms to Employer's description of a foreman's usual duties.